EON Bank Bhd v Kumpulan Sepang Utama Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–552 OF 2003
ABDUL WAHAB SAID AHMAD JC
10 JANUARY 2005

Civil Procedure — Service — Letter of demand — Proof of service by plaintiff — Whether defendant shown any circumstance that would render it impossible for him to receive letter of demand

Contract — Guarantee — Discharge — Variation of terms of letter of offer and facilities agreement — Whether guarantor should be discharged as surety —Contracts Act 1950 s 86

Contract — Terms — Condition precedent — Draw down of credit facility for benefit of bank — Whether bank entitled to waive

The fourth defendant appealed against the decision of the senior assistant registrar granting the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980. The plaintiff claimed against the fourth defendant the sum RM1,566,253.12 with interest arising from an overdraft granted to the first defendant by a letter of offer dated 30 August 2001 and facilities agreement dated 19 November 2001. The fourth defendant, together with the second and third defendant gave a joint and several guarantee. The overdraft was fully drawn down on 30 November 2001. The first defendant failed to make payment of the amount due under the facility. The plaintiff, through its solicitors by a letter dated 11 November 2002, demanded that the first defendant pay the said amount. The plaintiff also sent a letter of recall and demand dated 29 January 2003. Learned counsel for the fourth defendant submitted that the guarantee executed by the fourth defendant was an 'on demand guarantee' and as such the fourth defendant's liability will only arise upon demand being made on him. The defendant denied that the plaintiff had sent the letter of demand to the address stated in the guarantee. The postcode was said to be different. The fourth defendant also raised the issue that the terms of the contract had been varied and that he should be discharged as surety in accordance with s 86 of the Contracts Act 1950. The fourth defendant's reason was that the credit facility was given to the first defendant before the conditions precedent stated in the facility agreement were fulfilled. It was also alleged that the credit facility was given before the plaintiff had ascertained that the first defendant used the credit facility as working capital. The fourth defendant claimed that as a result of that, the terms of the letter of demand and facility agreement was varied without his knowledge.

Held, dismissing the fourth defendant's appeal with costs:

(1) There had not been any variation of the terms of the letter of offer and the facilities agreement. The contemporaneous documentary evidence

showed that the credit facility was drawn down on the instructions of the first defendant and after all the conditions precedent to draw down were complied with (see para 18).

(2) The fulfilment by the first defendant of the conditions precedent to the draw down of the credit facility set out in the facilities agreement was irrelevant to the plaintiff's claim against the fourth defendant. The facilities agreement clearly stated that the conditions precedent to draw down are to be fulfilled to the satisfaction of the plaintiff. Since the fulfilment of the conditions precedent for the draw down by the first defendant is for the benefit of the plaintiff, the plaintiff is entitled to waive them (see para 19).

(3) The fourth defendant was a director of the fourth defendant. He ought to have known of the first defendant's application for credit facility, the terms upon which it was granted, what the moneys under the facility were used for and the plaintiff's recall of the said facility. As such the fourth defendant cannot be allowed to resile from the terms of the guarantee (see para 21).

(4) The plaintiff has sufficiently proven the service of the letter of demand on the fourth defendant and it was the very same address stated in the guarantee. However the fourth defendant had failed to show any circumstance that would have rendered it impossible for him to receive the letter of demand (see para 22).

[**Bahasa Malaysia summary**

Defendan keempat telah merayu terhadap keputusan penolong kanan pendaftar yang telah membenarkan permohonan plaintif untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif telah menuntut terhadap defendan keempat sejumlah RM1,566,253.12 dengan faedah lanjutan dari satu overdraf yang diberikan kepada defendan pertama melalui satu surat tawaran bertarikh 30 Ogos 2001 dan perjanjian pinjaman bertarikh 19 November 2001. Defendan keempat, bersama dengan defendan kedua dan ketiga telah memberikan satu jaminan bersama dan berasingan. Overdraf tersebut telah digunakan dengan sepenuhnya pada 30 November 2001. Defendan pertama telah gagal membayar amaun yang terhutang di bawah kemudahan itu. Plaintif, melalui peguam caranya telah menghantar satu surat bertarikh 11 November 2002, menuntut supaya defendan pertama membayar amaun tersebut. Plaintif juga telah menghantar satu surat penarikan dan tuntutan bertarikh 29 Januari 2003. Peguam untuk defendan keempat telah berhujah bahawa jaminan yang ditandatangani oleh defendan keempat adalah bersifat 'jaminan atas tuntutan' dan oleh itu liabiliti defendan keempat akan hanya berbangkit apabila tuntutan dibuat terhadapnya. Defendan menafikan yang plaintif telah menghantarnya surat tuntutan ke alamat yang dinyatakan

di dalam jaminan tersebut. Poskod telah dikatakan berbeza. Defendan keempat juga telah membangkitkan isu bahawa terma-terma perjanjian telah diubah dan oleh itu ia perlu dilepaskan sebagai penjamin menurut s 86 Akta Kontrak 1950. Alasan defendan keempat ialah bahawa kemudahan kredit telah diberikan kepada defendan pertama sebelum syarat terdahulu yang dinyatakan di dalam perjanjian kemudahan tersebut ditunaikan. Juga dihujahkan bahawa kemudahan kredit telah diberikan sebelum plaintif memastikan bahawa defendan pertama menggunakan kemudahan kredit tersebut sebagai modal kerja. Defendan keempat berhujah bahawa akibat ini, terma-terma surat tuntutan dan perjanjian kemudahan telah diubah tanpa pengetahuannya.

Diputuskan, menolak rayuan defendan keempat dengan kos:

(1) Tidak terdapat apa-apa perubahan kepada terma-terma surat tawaran dan perjanjian kemudahan. Bukti dokumentari semasa menunjukkan bahawa kemudahan kredit telah digunakan atas arahan defendan pertama dan selepas semua syarat terdahulu untuk penggunaan dituruti (lihat perenggan 18).

(2) Penunaian oleh defendan pertama kesemua syarat terdahulu untuk penggunaan kemudahan kredit yang dinyatakan di dalam perjanjian kemudahan adalah tidak relevan kepada tuntutan plaintif terhadap defendan keempat. Perjanjian kemudahan dengan terangnya menyatakan bahawa syarat-syarat terdahulu untuk penggunaan mesti ditunaikan setakat kepuasan plaintif. Oleh kerana penunaian syarat-syarat terdahulu untuk penggunaan oleh defendan pertama adalah untuk manfaat plaintif, plaintif berhak mengetepikan mereka (lihat perenggan 19).

(3) Defendan keempat adalah pengarah defendan keempat. Dia seharusnya tahu mengenai permohonan defendan pertama untuk kemudahan kredit, terma-terma atas mana kemudahan itu diberikan, untuk apa wang-wang di bawah kemudahan itu digunakan, dan mengenai penarikan kemudahan tersebut oleh plaintif. Oleh itu, defendan keempat tidak boleh dibenarkan mengundur diri daripada terma-terma jaminan tersebut (lihat perenggan 21).

(4) Plaintif telah berjaya membuktikan penyerahan surat tuntutan terhadap defendan keempat dan alamatnya adalah alamat yang sama seperti yang dinyatakan di dalam jaminan tersebut. Walau bagaimanapun, defendan keempat telah gagal menunjukkan apa jua keadaan yang mungkin menjadikannya mustahil untuk defendan keempat menerima surat tuntutan tersebut (lihat perenggan 22).]

Notes

For cases on discharge of guarantor, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2306–2310.

For cases on terms of condition, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4621–4625.
For cases on service of letter of demand, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 5259.

Cases referred to

Arab-Malaysian Finance Bhd v Chong Chin Shoong [1997] MLJU 264 (folld)
Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)
Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd [1989] 3 MLJ 155 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31 (refd)
Supreme Finance (M) Bhd v Wing Hong How [1999] 3 MLJ 114 (refd)

Legislation referred to

Contracts Act 1950 s 86
Rules of the High Court 1980 O 10 r 1(3), O 14

Shamini Naidu (Shahrizat Rashid & Lee) for the plaintiff.
Fiona Bodipalar (CC Pek with her) (Bodipalar Ponnudari Nathan) for the fourth defendant.

Abdul Wahab Said Ahmad JC:

[1] This is an appeal by the fourth defendant against the decision of the senior assistant registrar granting the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980.

[2] The plaintiff's claim against the fourth defendant is for the amount of RM1,566,253.12 with interest at the rate of 2% pa above BLR. The claim stems from credit facilities, more precisely an overdraft, granted to the first defendant by a letter of offer dated 30 August 2001 and facilities agreement dated 19November 2001. The fourth defendant, together with the second and third defendant gave a joint and several guarantee.

[3] The overdraft was fully drawn down on 30 November 2001. The first defendant failed to make payment of the amount due under the facility. The plaintiff, through its solicitors by a letter dated 11 November 2002, demanded that the first defendant pay the said amount. The plaintiff also sent a letter of recall and demand dated 29 January 2003.

[4] The fourth defendant's learned counsel in his submission said that the guarantee executed by the fourth defendant is an 'on demand guarantee'. The

fourth defendant's liability will arise upon demand being made on him. Service of the notice of demand is a condition precedent, which the plaintiff must comply with. The case of *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 was referred to on this point.

[5] The defendant denied that the plaintiff had sent the letter of demand to the address stated in the guarantee. The postcode was said to be different. The defendant said that it is not true that the address stated in the statement of claim is the same as that in the letter of demand. The service of the writ does not prove that the fourth defendant has received the letter of demand. The fourth defendant contended that the unconditional appearance entered by the fourth defendant does not show that the writ was served at the correct address.

[6] The defendant's learned counsel referred to *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155. In this case the Supreme Court held that the bank is still required to serve a proper demand on the guarantor in accordance with the terms of the guarantee despite the existence of the principal debtor clause.

[7] The fourth defendant also raised the issue that the terms of the contract had been varied and that he should be discharged as surety, in accordance with s 86 of the Contracts Act 1950. The section provides that: 'Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to the transactions subsequent to the variance'.

[8] The fourth defendant's reason was that the credit facility was given to the first defendant before the conditions precedent stated in the facility agreement were fulfilled. It was also alleged that the credit facility was given before the plaintiff had ascertained that the first defendant used the credit facility as working capital. The fourth defendant claimed that as a result of that, the terms of the letter of demand and facility agreement was varied without his knowledge. He is therefore discharged from his obligation as a guarantor.

[9] The plaintiff replied to the issues raised by the fourth defendant. On the fourth defendant's assertion that he has not received the letter of demand, the plaintiff, through its learned counsel said that this statement is inconsistent with non-disputed contemporaneous documents. The fourth defendant admits to having executed the guarantee as security for the credit facility. The letter of demand was duly served on the fourth defendant by registered post at his address as stated in the letter of guarantee and his last known address. The address appears in his affidavits. Therefore it is more probable that not that the fourth defendant has received the letter of demand.

[10] The defendant failed to show any circumstance that would have rendered it impossible for him to have received the letter of demand. *Arab-Malaysian Finance Bhd v Chong Chin Shoong* [1997] MLJU 264 was referred to.

[11] The plaintiff said that the writ and statement of claim was also served on the fourth defendant at the said address. The fourth defendant entered unconditional appearance on 30 May 2003. By virtue of O 10 r 1(3) of the Rules of High Court 1980, the writ shall be deemed to have been duly served on the date on which fourth defendant entered appearance. The plaintiff's learned counsel referred to *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 and *Supreme Finance (M) Bhd v Wing Hong How* [1999] 3 MLJ 114.

[12] The difference in the postal code in the address of the fourth defendant in the letter of demand will not affect the service of the letter of demand. The plaintiff had referred to the directory of postcodes published by Pos Malaysia Berhad. The plaintiff's learned counsel said that it is an authoritative text the contents of which the court can take notice.

[13] It was submitted by the plaintiff's learned counsel that cl 1 of the letter of guarantee says that the fourth defendant undertakes to make payment of the debts of the first defendant as a principal debtor. Since the effect of the guarantee is to make the defendant a principal debtor, there is no necessity for a demand. The service of the statement of claim would suffice as a demand for payment upon guarantee. On this, learned counsel for the plaintiff referred to *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 and *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141.

[14] According to the plaintiff's learned counsel, the principles in the aforesaid cases were not considered at all in the case relied on by the fourth defendant, *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31.

[15] The plaintiff denied that there are variations in the terms of the letter of offer and loan agreement. This is because the credit facility was issued at the first defendant's instruction and after all the preconditions were fulfilled. Further, the terms and conditions on which the credit facility was given do not require the plaintiff to control the first defendant's usage of the monies under the facility.

[16] The plaintiff said that in any event the fourth defendant, by signing the guarantee document, has agreed that any change or variation to the credit facility without his knowledge will not discharge him from his obligation.

[17] After reading the plaintiff's summons in chambers, all the affidavits filed on behalf of both parties and submissions of the counsels on both sides, I dismissed the fourth defendant's appeal with costs. I arrived at the decision after considering the arguments and came to the conclusion that the fourth defendant had not raised any issues that are fit to be tried.

[18] I am satisfied that there had not been any variation of the terms of the letter of offer and the facilities agreement. The contemporaneous documentary evidence shows that the credit facility was drawn down on the instructions of

A the first defendant and after all the conditions precedent to draw down were complied with 'CSK–8', a letter dated 26 November 2001 from BC Teh & Yeoh to the plaintiff and copied to the first defendant, confirms this. The first defendant's director's resolution dated 30 August 2001 signed by among others, the fourth defendant, authorised the acceptance of the credit facility on the B terms and conditions set out in the letter of offer. The terms and conditions of the credit facility do not require the plaintiff to monitor the first defendant's use of the moneys drawn down. Therefore it is clear that there has been no variation to the terms of the letter of offer and the credit facility.

C **[19]** I agree that the fulfilment by the first defendant of the conditions precedent to the draw down of the credit facility set out in s 4.01 of the facilities agreement is irrelevant to the plaintiff's claim against the fourth defendant. Section 4.01 of the facilities agreement clearly states that the conditions precedent to draw down are to be fulfilled to the satisfaction of the plaintiff. Since the fulfilment of the conditions precedent for the draw down by the D first defendant is for the benefit of the plaintiff, the plaintiff is entitled to waive them.

[20] Clause 7 and 16 of the guarantee further fortify this point. By signing the agreement, these provisions state that the fourth defendant agreed that he E would not be discharged or released from the guarantee by any variation or alteration of the credit facility without his knowledge or consent.

[21] I take cognisance of the fact that the fourth defendant was a director of the fourth defendant. He ought to have known of the first defendant's application for credit facility, the terms upon which it was granted, what the F moneys under the facility were used for and the plaintiff's recall of the said facility. As such the fourth defendant cannot be allowed to resile from the terms of the guarantee.

[22] I am satisfied that the plaintiff had sufficiently proven that the letter of G demand was served on the fourth defendant. The fourth defendant's address given in his first affidavit is No 10, Jalan TK 1/11, Taman Kinrara, Batu 7, Jalan Puchong, 47100 Puchong. The result of the search at the Companies Commission shows the same address. However, the plaintiff had sent the letter of demand to No 10, Jalan Kinrara, Jalan Puchong, 58200 Kuala Lumpur. It was sent by prepaid registered post and acknowledged for service by the H postal authority. It was the address stated in the guarantee. I notice that the only difference in the address is the word 'Batu 7' and the postcode. The plaintiff's learned counsel had submitted that the postcode for Jalan Puchong until the 12th kilometre (equivalent to 7.452 miles) is 58200 Kuala Lumpur. This is in accordance with the directory of postcodes published by Pos Malaysia I Berhad. The plaintiff has made reference to this at p 17 of its bundle of authorities. I agree with the plaintiff's submission. The plaintiff has sufficiently proven the service of the letter of demand on the fourth defendant and it is

the very same address stated in the guarantee. However the fourth defendant has failed to show any circumstance that would have rendered it impossible for him to receive the letter of demand. On this, I agree with *Arab-Malaysian Finance Bhd v Chong Chin Shoong*[1997] MLJU 264 as submitted by the plaintiff.

[23] By virtue of the above reasons, I dismissed the fourth defendant's appeal with costs.

Appeal dismissed.

Reported by Kanesh Sundrum